U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 10Dec2001

In the Matter of:	:	
	:	
GARLAND STILTNER,	:	
Claimant,	:	
	:	Case No: 2000-BLA-191
v.	:	
	:	
ISLAND CREEK COAL COMPANY,	:	
Employer,	:	
	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS,	:	
Party-In-Interest	:	

Garland Stiltner
Pro Se Claimant

Mary Rich Maloy, Esquire
For the Employer

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER -- REJECTION OF CLAIM

Statement of the Case

This proceeding involves a claim for benefits under the Black Lung Benefits Act as amended, 30 U.S.C. §901 *et seq.* (the Act), and the regulations promulgated thereunder.[1] Since Claimant filed this application for benefits after March 31, 1980, Part 718 applies. This claim is governed by the law of the Fourth Circuit of the United States since Claimant was last employed

[1] All applicable regulations which are cited in this Decision and Order are included in Title 20, Code of Federal Regulations, and are cited by part or section only. The Director's exhibits are denoted "D-"; Claimant's exhibits, "C-"; Employer's exhibits, "E-"; and citations to the transcript of the hearing, "Tr."

in the coal industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Claimant, Garland Stiltner, filed his first claim for benefits under the Act in June 1981, and that claim was denied by the Department of Labor on December 7, 1981 and November 26, 1982 (D-37-1, 37-11, 37-13).[2] Claimant filed a second claim for benefits in March 1983, and the Department of Labor denied that claim on April 3, 1984 (D-36-1, 36-24). Claimant timely requested a hearing and such hearing was held on January 12, 1988 in Abingdon, Virginia (D-36-26, 36-95). On May 30, 1990 Administrative Law Judge Ben L. O'Brien issued a Decision and Order denying benefits. In that decision, Judge O'Brien determined that Claimant established a material change in conditions, but denied benefits on grounds that Claimant did not have pneumoconiosis and did not have a disabling respiratory or pulmonary impairment (D-36-74). Claimant appealed, and Employer filed a Motion for Reconsideration, arguing that Judge O'Brien erred in finding that Claimant established a material change in conditions and further erred in refusing to admit three of Employer's proposed post-hearing exhibits (D-36-75, 36-77). On July 20, 1990, pursuant to Claimant's request that his appeal be dismissed as premature, the Benefits Review Board dismissed Claimant's appeal (D-36-78). Administrative Law Judge G. Marvin Bober denied Employer's Motion for Reconsideration on June 27, 1991 (D-36-79). Claimant timely appealed the Order Denying Motion for Reconsideration of Judge Bober and the Decision and Order of Judge O'Brien denying benefits, and Employer cross-appealed challenging the material change in conditions determination and decision not to admit evidence post-hearing. (D-36-81, 36-82). On September 9, 1992, the Director, Office of Workers' Compensation Programs, filed a Motion to Remand In Response to the Employer's Cross-Petition for Review for further review of the medical evidence (D-36-86).

In an unpublished opinion dated August 13, 1993, the Benefits Review Board remanded the case, affirming in part and vacating in part Judge Bober's Order Denying Employer's Motion for Reconsideration and Judge O'Brien's Decision and Order (D-36-93). In its decision, the Board affirmed Judge O'Brien's findings that the miner had established thirty-nine years of coal mine employment, and that the existence of pneumoconiosis had not been established pursuant to §718.202(a)(1) and (a)(2). The Board also affirmed Judge Bober's decision not to admit Employer's post-hearing exhibits. The Board, however, remanded the case to Judge Bober for further consideration of the evidence pursuant to §718.305[3], and for a more complete discussion of three medical reports. On remand, in a Decision and Order dated January 26, 1994, Judge

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[2] A hearing was not held in this, the initial, claim because Claimant's request for hearing was untimely filed and could, therefore, not be honored.

[3] Section 718.305 applies to claims filed prior to January 1, 1982 by miners employed for fifteen or more years in one or more underground coal mines. Under §718.305, if there is a chest x-ray submitted in connection with such miner's claim which is interpreted as negative with respect to the requirements of §718.304, and if other evidence demonstrated the existence of a totally disabling respiratory or pulmonary disease, then there shall be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. The presumption may be rebutted only by establishing that the miner does not have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of coal mine employment.

Bober found that Claimant failed to establish that he was totally disabled due to a respiratory or pulmonary impairment, and, accordingly, the §718.305 presumption could not be invoked (D-36-96). Therefore, since Claimant was unable to establish total disability due to pneumoconiosis, Judge Bober found that he was not entitled to benefits under the Act. The Board affirmed Judge Bober's decision in an unpublished opinion dated November 28, 1994 (D-36-101).

This claim arises out of a duplicate claim filed by Claimant on April 15, 1999 (D-1). Island Creek Coal Company, Employer[4], was notified of the claim and timely controverted (D-16, 17, 19). The Department of Labor issued a Notice of Initial Finding awarding benefits on June 29, 1999 (D-18). Pursuant to the Employer's request for a hearing, the file was forwarded to the Office of Administrative Law Judges on December 13, 1999 (D-33, 38, 39). Hearings were scheduled for May and September 2000, but were continued. In a letter dated November 10, 2000, Claimant requested a decision on the record in lieu of a hearing. The Employer did not object, and Judge Edward Terhune Miller issued an Order Canceling Hearing - Decision on Written Record on November 29, 2000.

The record in this case contains thirty-nine Director's Exhibits. All of the materials from Claimant's two prior claims are contained in Director's Exhibits thirty-six and thirty-seven. There are two examination reports in the current claim; the Claimant was examined by Dr. Forehand on May 21, 1999, and was subsequently examined by Dr. McSharry on November 18, 1999 (D-9, 10, 11, 13; E-2). The Claimant submitted a statement by Dr. Reddy dated July 17, 2000, which addresses the Claimant's degenerative joint disorder of his right knee (C-1). By letter dated December 18, 2000, the Employer described nineteen items of evidence herein described as E-1 through E-19. All of the identified exhibits have been admitted into evidence.

The findings and conclusions that follow are based upon an analysis of the entire record, together with applicable statutes, regulations and case law, in relation to those issues which remain in substantial dispute.

ISSUES[5]

1. Whether, under §725.309, Claimant has shown a material change in conditions since the previous denial of benefits on November 28, 1994, by establishing the existence of pneumoconiosis or total disability.

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[4] The company records of Island Creek Coal Company establish that it employed Claimant through July 15, 1982, which was Claimant's last coal mine employment (D-5, 15). Therefore, Island Creek Coal Company is the properly named responsible operator in this claim.

[5] Although Employer contested all applicable issues in this claim, and no stipulations were made, this tribunal limits consideration to those issues which are in substantial dispute and those which were argued by Employer in Employer's Closing Argument.

2. If so, whether Claimant has established the other elements of entitlement to benefits under Part 718, namely, that if he has pneumoconiosis, it arose out of his coal mine employment, and that Claimant's total disability is due to pneumoconiosis.

FINDINGS OF FACT AND CONCLUSION OF LAW

Background, Dependents and Coal Mine Employment

Claimant,Garland Stiltner, was born on January 10, 1923, and completed six years of formal education (D-1). For the purpose of augmentation of benefits, Claimant has a dependent wife, the former June Wright, to whom he was married on June 15, 1949 (D-8).

The Claimant alleged thirty-eight years of coal mine employment (D-38). Employer contested this allegation in this claim, and in the past, has stipulated to at least twelve years (D-36-95). In the previous claim, Judge O'Brien determined that the evidence of record established approximately thirty-nine years of coal mine employment (D-36-74). More recently, a Department of Labor Claims Examiner, utilizing Claimant's social security records and established earnings rates, determined that Claimant's was employed by the coal mines for thirty-six years, seven months, and fifteen days (D-15). Because the Employer neither contested or addressed Claimant's length of coal mine employment in its closing argument, this tribunal finds upon the evidence of record that Claimant was employed in the coal mines for at least thirty-six years.

Medical Evidence Developed Subsequent to the Closing of the Record on Which the Prior Denial was Based[6]

X-rays[7]

Exhibit No.	X-ray Date	Reading Date	Physician/Qualifications	Diagnosis
E-12	11/24/87	11/24/87	unknown	-/-; COPD
E-12	1/20/88	1/20/88	Coburn R	-/-; normal chest
E-12	4/14/88	4/14/88	Fowler R	-/-; no active diseases in

[6] The Benefits Review Board's November 28, 1994 denial of benefits constitutes the previous denial for the purposes of this proceeding.

[7] The following abbreviations are used in describing the qualifications of the physicians: B-reader, "B"; Board-certified radiologist, "R". The professional credentials of Drs. Diehl , Fowler and Coburn are not in evidence. However, this tribunal takes judicial notice that these physicians' relevant qualifications are disclosed on the worldwide web, American Board of Medical Specialties, Who's Certified Results, at http://www.abms.org. *See Maddaleni v. Pittsburgh & Midway Coal Mining Co.*, 14 B.L.R. 1-135 (1990). An interpretation indicating "-/-" is used by this tribunal to signify that the x-ray was not reported/classified/conducted in accordance with the requirements of §718.102 of the pre-amended regulations.

Exhibit No.	X-ray Date	Reading Date	Physician/Qualifications	Diagnosis
				the chest
D-25	8/3/88	2/26/89	Wheeler B/R	0/1, q/p; possible granuloma or sclerosis; subtle nodularity mid portion or both upper lobes or I may be overreading pulmonary vascular prominence
E-12	2/20/90	2/20/89	Fowler R	-/-; no active disease in the chest; small nodular density mid lateral left lung field
D-25	4/26/90	5/21/90	Wheeler B/R	-/-; normal except for small calcified granuloma; no pneumoconiosis
D-25	4/26/90	5/21/90	Scott B/R	-/-; possible calcified granuloma lateral left mid lung
D-25	4/26/90	6/21/90	Fino B	-/-; ? cancer or neoplasm, 6 mm in LMZ
E-12	4/26/90	4/26/90	Diehl R	-/-; small calcific granulmoa
E-1	3/31/93	12/29/99	Meyer B/R	unreadable
E-4	3/31/93	12/10/99	Wiot B/R	unreadable
E-4	3/31/93	12/13/99	Spitz B/R	unreadable
E-17	3/31/93	8/11/00	Castle B	unreadable
E-1	12/20/94	12/29/99	Meyer B/R	-/-; calcified granuloma L mid lung; hiatal hernia
E-4	12/20/94	12/10/99	Wiot B/R	-/-; calcified granulomata
E-4	12/20/94	12/13/99	Spitz B/R	overexposed
E-17	12/20/94	8/11/00	Castle B	-/-; calcified granuloma
E-1	3/1/95	12/29/99	Meyer B/R	unreadable
E-4	3/1/95	12/10/99	Wiot B/R	unreadable, overexposed

Exhibit No.	X-ray Date	Reading Date	Physician/Qualifications	Diagnosis
E-4	3/1/95	12/13/99	Spitz B/R	overexposed
E-17	3/1/95	8/11/00	Castle B	unreadable, dark
E-1	1/23/97	12/29/99	Meyer B/R	-/-; calcified granuloma L mid lung; hiatal hernia
E-4	1/23/97	12/10/99	Wiot B/R	unreadable, grid lines
E-4	1/23/97	12/13/99	Spitz B/R	-/-
E-17	1/23/97	8/11/00	Castle B	0/1, q/p; calcified granuloma
E-1	10/5/98	12/29/99	Meyer B/R	-/-; calcified granuloma ; hiatal hernia
E-4	10/5/98	12/10/99	Wiot B/R	-/-; calcified granulomata
E-4	10/5/98	12/13/99	Spitz B/R	-/-
E-8	10/5/98	3/29/00	Wheeler B/R	-/-; no evidence of silicosis or coal workers' pneumoconiosis; probable small hiatus hernia; probable small calcified granuloma; probable sclerosis
E-8	10/5/98	3/29/00	Scott B/R	-/-; probable small hiatus hernia; probable small areas of sclerosis
E-9	10/5/98	4/18/00	Kim B/R	-/-; several small calcified granulomata; small hiatal hernia; ? bony island
E-17	10/5/98	8/11/00	Castle B	-/-; calcified granuloma
E-7	10/5/98	3/23/00	Fino B	-/-; calcified granulomata in the left lung
D-13	5/21/99	5/21/99	Forehand B	1/0, q/p; scattered partially calcified granulomata right midzone, upper and mid left lung zones
D-14	5/21/99	6/8/99	Gaziano B	1/0, q/q; scattered calcified granuloma
D-29	5/21/99	9/24/99	Wiot B/R	-/-; calcified granuloma
D-31	5/21/99	10/1/99	Meyer B/R	-/-; no evidence of coal

Exhibit No.	X-ray Date	Reading Date	Physician/Qualifications	Diagnosis
				workers' pneumoconiosis; sequellae of prior granulomatous disease; slight blunting of costophrenic angles
D-32	5/21/99	10/10/99	Spitz B/R	-/-; no evidence of coal worker's pneumoconiosis
E-9	5/21/99	4/12/00	Wheeler B/R	-/-; few small bilateral calcified granulmata; minimal blunting CPAS; minimal obesity
E-9	5/21/99	4/18/00	Kim B/R	-/-; several calcified granulomata; small hiatal hernia
E-7	5/21/99	4/4/00	Fino B	-/-; scattered calcified granulmata
E-2	11/18/99	11/18/99	McSharry	-/-; parenchyma has modestly increased basilar density suggesting atelectasis; no changes of pneumoconiosis are apparent
E-2	11/18/99	11/30/99	Wheeler B/R	-/-; increased AP chest compatible with deep breath or emphysema; small hiatus hernia; calcified granuloma; possible minimal obesity
E-2	11/18/99	11/22/99	Scott B/R	-/-; 5 mm density - bone island or overlying calcified granuloma; obesity
E-3	11/18/99	2/10/00	Wiot B/R	-/-; no evidence of coal workers' pneumoconiosis; old granulomatous disease at left apex; calcified granuloma on the left; old

Exhibit No.	X-ray Date	Reading Date	Physician/Qualifications	Diagnosis
				pleural thickening most likely residual of a past inflammatory process
E-6	11/18/99	3/17/01	Meyer B/R	-/-; no radiographic evidence of coal workers' pneumoconiosis; sequellae of prior granulmatous disease; density likely hiatal hernia
E-9	11/18/99	3/25/00	Spitz B/R	-/-; no evidence of coal workers' pneumoconiosis
E-17	11/18/99	8/11/00	Castle B	0/1, s/s; calcified granuloma

Pulmonary Function Studies[8, 9]

Exh. No.	Date Of Test	Age/ Height	Valid	FEV1	MVV	FVC	Ratio	Qualify
E-12	11/25/87	64/72"	Yes	3.09	75	4.03	77	No
D-9	5/21/99	76/70"	Yes	2.52	58	3.56		No
E-2	11/18/99	76/70"	Yes	2.75 2.95	76	3.99 4.35	68 68	No

Arterial Blood Gas Studies [10, 11]

Exhibit No.	Test Date	PCO2	PO2	Qualify
E-12	2/14/85	39.2	73.6	No
E-12	11/25/87	35.2	70.7	No
E-12	4/14/88	31.3	76.1	No

[8] Second set of entries, if any, on the same test relates to results after administration of bronchodilators.

[9] Because different heights have been recorded for Claimant, this tribunal must resolve the height discrepancy. *Protoppas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This tribunal averaged the recorded heights and determined that Claimant is 70.07 inches tall.

[10] Second set of entries, if any, on the same test relates to results after administration of exercise.

[11] Dr. Mohammd I. Ranavaya, who is board-certified in occupational medicine, found the study performed on May 21, 1999 technically acceptable. (D-12).

E-12	7/21/89	35.9	70.5	No
D-11	5/21/99	35 35	78 64	No Yes
E-2	5/11/99	36	80	No

Medical Reports and Opinions

Dr. J. Randolph Forehand, who is board-certified in pediatrics and allergy and immunology, examined Claimant on May 21, 1999. (D 9, 10, 11, 13). Dr. Forehand recorded an employment history of thirty-eight years of coal mine employment, with thirty-five of those years completed underground, a family history, and a medical history. The examination included an x-ray, pulmonary function testing, an arterial blood gas study, and an EKG. Claimant reported symptoms of daily sputum, wheezing, dyspnea when walking up hill, cough, chest pain due to angina, and ankle edema. Dr. Forehand diagnosed Claimant with coal workers' pneumoconiosis[12] based on Claimant's history, the arterial blood gas study, and chest x-ray. He also diagnosed old granulomatous disease based on the chest x-ray. He attributed Claimant's coal workers' pneumoconiosis to coal dust exposure and the granulomatous disease to infection. Dr. Forehand concluded that a significant respiratory impairment of a gas-exchange nature was present. He concluded that Claimant would be unable to return to work, and that he was totally and permanently disabled. Dr. Forehand also diagnosed Claimant with arthritis in his right knee, and concluded that the pain would prevent Claimant from returning to his last coal mining employment.

Dr. Roger J. McSharry, who is board-certified in internal, pulmonary, and critical care medicine, examined the Claimant on November 18, 1999. (E-2). Dr. McSharry recorded occupational, medical, surgical and family histories. He conducted a physical examination including pulmonary function testing, an arterial blood gas study, a chest x-ray, and an electrocardiogram. Dr. McSharry also reviewed the report of Dr. Forehand's May 21, 1999 examination of Claimant. Based on consideration of Claimant's thirty-eight years of coal mine employment, the chest x-ray interpreted as negative for pneumoconiosis by two B-readers, normal arterial blood gas study results, and a normal spirometry, Dr. McSharry concluded that Claimant does not have pneumoconiosis in any form. Dr. McSharry ruled out clinical pneumoconiosis, stating that the radiographic evidence reveals no evidence of pneumoconiosis, which "argues strongly against the presence of the disease." Dr. McSharry also explained that a diagnosis of any other form of pneumoconiosis was unwarrented. He stated, "Pulmonary function test abnormalities are expected in symptomatic coal worker's pneumoconiosis," and that Claimant's pulmonary function testing was essentially normal**.** Dr. McSharry maintained that the minimal amount of air trapping observed would not likely result in any symptoms. Based on his own examination and that of Dr. Forehand, Dr. McSharry concluded that Claimant did not have coal workers' pneumoconiosis or any disease of the lungs caused by or aggravated by exposure to coal mining or coal dust. He did not find that any pulmonary or respiratory impairment was

[12] Although "coal workers' pneumoconiosis" may be used synonymously with pneumoconiosis in medical circles, the two terms are distinct legally." *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821 (4th Cir. 1995).

demonstrated, and, therefore, concluded that there was no respiratory limitation which would prevent Claimant from resuming the previous coal mining employment he described during the examination.

Dr. McSharry also explained his disagreement with Dr. Forehand's diagnosis of Claimant. (E-2). Dr. McSharry determined that the x-ray relied upon by Dr. Forehand in diagnosing Claimant's coal workers' pneumoconiosis, after being reread by three B-readers "of national reputation" as completely negative, did not indicate the radiographic presence of pneumoconiosis. While Dr. McSharry found no reason to discount the decline in oxygen pressure with exercise demonstrated by Dr. Forehand's test, he disagreed with Dr. Forehand's determination that the test indicated the presence of a pulmonary disease. Instead, Dr. McSharry stated that based on the degree of exercise performed and the lack of evidence of advanced lung disease, Claimant more likely had exercise induced pulmonary edema--a condition which may be seen in patients with underlying ischemic heart disease such as Claimant. Concluding his review of Dr. Forehand's report, Dr. McSharry stated, "While the degree of exercise demonstrated in this case is minimal, a cardiovascular cause for the apparent desaturation seems much more likely than the presence of lung disease which is not otherwise manifested through pulmonary function tests or examination."

Dr. McSharry was deposed on April 24, 2000. (E-11). Dr. McSharry testified regarding his qualifications, and affirmed the findings of his previous report, elaborating on his diagnosis of the Claimant.

Dr. McSharry prepared a supplemental report dated July 21, 2000 based on his review of his own report and deposition, miscellaneous Clinch Valley Medical Center records, x-ray interpretations by Drs. Wiot, Spitz, Meyer, Wheeler, Scott, and Kim, and the reports of Drs. Zaldivar, Fino, Morgan, and Castle (E-14). Upon review, Dr. McSharry concluded that the records submitted for his review "emphasized" his prior opinion that there is no objective evidence to diagnose coal workers' pneumoconiosis. He found no evidence of a pulmonary or respiratory impairment of any type, and, therefore, found no evidence of a disability related to pulmonary disease.

Dr. George L. Zaldivar, who is board-certified in internal and critical care medicine and in the subspecialty of pulmonary diseases, prepared a report based on review of specified medical records and opinions on March 28, 2000. (E-5). The materials reviewed included interrogatories completed by Claimant, the 1988 hearing transcript, hospital admissions and reports dating back to 1972, and reports from medical examinations and record reviews including the reports from Dr. Forehand's May 21, 1999 and Dr. McSharry's November 18, 1999 examinations of Claimant. Based on consideration of the evidence before him, Dr. Zaldivar determined that there was no evidence of either coal workers' pneumoconiosis or any respiratory impairment in this case. He found that, while Claimant may be disabled from performing his usual coal mining work due to orthopedic problems related to his back, this impairment is unrelated to any lung disease or pneumoconiosis. Dr. Zaldivar concluded that even if Claimant had pneumoconiosis, his opinion

regarding Claimant's pulmonary capacity to perform "not only his usual job [,] but also arduous manual labor" would remain the same.

Dr. Zaldivar prepared a supplemental report dated August 7, 2000 based on review of miscellaneous records from the Clinch Valley Medical Center, x-ray interpretations by Drs. Wiot, Spitz, Meyer, Wheeler, Kim, and Scott, the deposition transcript of Dr. McSharry, and the opinions of Drs. Fino, Morgan, and Castle. (E-16). Dr. Zaldivar concluded that there is not sufficient evidence to justify a diagnosis of coal workers' pneumoconiosis. He did not find evidence of a pulmonary or respiratory impairment, nor did he find evidence that Claimant is totally or permanently disabled from performing his usual coal mining work or work of similar effort.

Dr. Zaldivar was deposed on December 11, 2000. (E-19). Dr. Zaldivar explained his professional practice and qualifications, explained pulmonary function and arterial blood gas studies in general, reviewed the arterial blood gas studies performed by Drs. McSharry and Forehand, and discussed his previous findings.

Dr. Gregory J. Fino, who is board-certified in internal medicine and the subspecialty of pulmonary disease, prepared a report based on review of specified medical records and opinions on April 4, 2000. (E-7). The materials reviewed included his own prior review of medical records for this case, dated December 15, 1987, pulmonary function and arterial blood gas studies administered between 1974 and 1999, x-ray interpretations from films taken from 1966 through 1999, hospital admissions reports, and medical examination reports including those of Drs. Forehand and McSharry. Dr. Fino summarized all this objective evidence in charts, including a chart indicating Claimant's reported employment history, which consistently showed a history of thirty-eight years of coal mine employment. Additionally, Dr. Fino provided interpretations for the October 5, 1998 and May 21, 1999 x-rays. He interpreted both as negative for pneumoconiosis. After explaining the difference between clinical and legal pneumoconiosis, Dr. Fino stated that based on review of all the information provided, his opinion was that Claimant does not suffer from an occupationally acquired pulmonary condition as a result of coal mine dust exposure. He based his opinion on six factors: 1) the majority of chest x-rays were negative for pneumoconiosis; 2) his x-ray interpretations were negative for pneumoconiosis; 3) the acceptable spirometric evaluations were normal; 4) the diffusing capacity values were normal, which rules out the presence of clinically significant pulmonary fibrosis (pneumoconiosis being an example of pulmonary fibrosis); 5) normal lung volumes; and 6) a normal MVV, which means that there was no ventilatory impairment due to any obstructive or restrictive ventilatory defect. Dr. Fino concluded that from a functional standpoint, Claimant's pulmonary system is normal and that he retains the phsysiological capacity from a respiratory standpoint to perform his last job, assuming that his last job required sustained heavy labor.

Dr. Fino prepared a supplemental report dated August 7, 2000 based on his review of "Office Records: 2/22/80 - 12/3/87," miscellaneous records from the Clinch Valley Medical Center, x-ray interpretations of Drs. Kim, Wheeler, Scott, Meyer, and Spitz, the deposition transcript from Dr. McSharry, and the reports of Drs. Zaldivar, Morgan and Castle. (E-15). Review of the

additional information did not cause Dr. Fino to change any of his opinions in previous reports.

Dr. W.K.C. Morgan, who has the British equivalent of board-certification in internal medical and the subspecialty of pulmonary diseases, prepared a medical report on April 6, 2000 based on review of specified evidence. (E-7). The materials reviewed by Dr. Morgan included Claimant's initial claim for benefits, the transcript of the 1988 hearing, and chest x-ray interpretations, pulmonary function and arterial blood gas studies, examinations, and hospital admissions reports all dated between 1966 and 1999, included the more recent reports of Drs. Forehand and McSharrry. Based on review of the evidence, Dr. Morgan concluded that "even at the age of 76 Mr. Stiltner has no ventilatory impairment, has a normal diffusing capacity, and normal resting blood gases, except for the solitary exception of the blood gases obtained by Dr. Forehand." Dr. Morgan also concluded that the x-ray evidence did not provide any radiographic evidence of coal workers' pneumoconiosis. Dr. Morgan was uncertain was to whether Claimant was totally disabled, but noted that Claimant is known to have heart disease and problems with arthritis. He stated that Claimant is seventy-six years old, and, therefore, "age alone in this instance is disabling." Dr. Morgan concluded his report by stating that his opinion would not change if Claimant were found to have coal workers' pneumoconiosis.

Dr. Morgan prepared a supplemental report dated July 16, 2000 based on his review of the medical records from Clinch Valley Medical Center, x-ray interpretations by Drs. Wiot, Kim, Spitz, Meyer, and Wheeler, the opinions of Drs. Zaldivar, Fino, Castle, and the transcript from the deposition of Dr. McSharry. (E-13). Dr. Morgan affirmed his prior opinion based on this evidence. He concluded his opinion by stating, "Suffice it to say, he [Claimant] has no respiratory impairment so even if he had CWP, it is not producing any deleterious effect on his lung function.

Dr. James R. Castle, who is board-certified in internal medical and the subspecialty of pulmonary diseases, prepared a medical report on April 18, 2000 based on review of specified evidence. (E-10). The materials reviewed by Castle included Claimant's prior claim forms for benefits, the 1988 hearing transcript, and chest x-ray interpretations, pulmonary function and arterial blood gas studies, examinations, and hospital admissions reports all dated between 1966 and 1999, included the more recent reports of Drs. Forehand and McSharrry. Dr. Castle opined, based on the aforementioned evidence, that Claimant did not have coal workers' pneumoconiosis. Dr. Castle did note, however, that Claimant had significant enough exposure to have caused him to develop coal workers' pneumoconiosis if he were a susceptible host. Dr. Castle elaborated that Claimant never demonstrated any physical findings on a consistent basis indicating the presence of an interstitial pulmonary process, and, on most occasions, Claimant's pulmonary examinations were entirely normal. In relation to the x-ray readings, Dr. Castle noted that the vast majority of B-readers and radiologists determined that there was no evidence of any form of pneumoconiosis including coal workers' pneumoconiosis. Dr. Castle also explained that the pulmonary function studies all indicated the absence of an abnormality including obstruction, restriction or diffusion abnormalities, and, that the valid studies, including the recent study performed by Dr. McSharry, were entirely normal. Dr. Castle concluded that Claimant did not suffer from coal workers' pneumoconiosis or any other chronic dust disease of the lungs or sequelae that has been caused by,

contributed to, or substantially aggravated by coal mine dust exposure.

Dr. Castle determined that Claimant retained the respiratory capacity to perform his usual coal mining employment as a supply foreman. However, it was his opinion that Claimant is very likely disabled as a whole man due to cardiac disease and other medical problems unrelated to coal dust inhalation. In concluding the opinion, Dr. Castle explained that even if it were determined that Claimant had radiographic evidence of coal workers' pneumoconiosis, his opinion regarding lack of impairment or disability due to that process would remain unchanged because his opinion is not predicated upon negative x-ray interpretations. Instead, the opinion was contingent upon the lack of physiologic abnormality associated with coal workers' pneumoconiosis.

Dr. Castle prepared a supplemental report dated August 16, 2000 based on his review of the medical records from Clinch Valley Medical Center, x-ray interpretations by Drs. Wiot, Kim, Spitz, Meyer, and Wheeler, the opinions of Drs. Zaldivar, Fino, Morgan, and McSharry, and the transcript from the deposition of Dr. McSharry. (E-17). Based on his review of the evidence, Dr. Castle stated that none of the opinions expressed in his report of April 18, 2000 had changed.

Dr. Castle was deposed on August 23, 2000. (E-18). Dr. Castle testified regarding his credentials, reviewed recent pulmonary function and arterial blood gas studies, reviewed the radiographic evidence, and affirmed his findings in earlier reports.

The record contains twenty-five pages of miscellaneous medical records from Clinch Valley Medical Center. (E-12). The records span from February 1985 through march 1993. Treatment and diagnoses were primarily cardiac related. The reports contained three x-ray interpretations, four arterial blood gas studies, and one pulmonary function study. Records indicate that Claimant was treated and diagnosed with chronic obstructive pulmonary disease as a secondary diagnosis. None of the physicians reporting the presence of chronic obstructive pulmonary disease explained their diagnosis.

The record contains a memo from Dr. Reddy, Claimant's orthopedic physician, dated March 28, 2000. (C-1). The memo states, "This [patient] is unable to go through treadmill tests [bothering] his knee. He has severe D.J.D."

Duplicate Claim -- Material Change in Conditions

Since the instant claim was filed more than one year after the denial of Claimant's previous claim, it is considered a duplicate or subsequent claim under the Act. §725.309. A duplicate claim is to be denied on the same grounds as the previous denial unless there has been a material change in conditions. §725.309(d). To prove a material change in conditions, a claimant must prove, under all the favorable and unfavorable medical evidence of his condition after the previous denial, at least one of the elements previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*). In the instant claim, the previous

denial was based on the finding that Claimant did not establish the existence of pneumoconiosis or total disability. Therefore, in order to establish a material change in conditions, Claimant must establish, by virtue of the evidence relating to his medical condition after the previous denial, the existence of pneumoconiosis or total disability.

Existence of Pneumoconiosis

For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising from coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal", pneumoconiosis. See §718.201. Section 718.202(a) prescribes four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and reported biopsy or autopsy; (3) reliance upon certain presumptions which are set forth in §§718.304, 718.305, 718.306; or (4) the finding by a physician of pneumoconiosis as defined in §718.201 which is based upon objective evidence and supported by a reasoned medical opinion.

Since the record contains no evidence of a biopsy or autopsy, the existence of pneumoconiosis cannot be established under section 718.202(a)(2). Since there is no evidence that Claimant suffers from complicated pneumoconiosis, the presumption set forth in section 718.304 is inapplicable. Since the claim was filed after January 1, 1982, and since this is not a survivor's claim, the presumptions set forth in sections 718.305 and 718.306 are inapplicable as well.

Of the forty-eight readings for the thirteen x-rays of record, only two interpretations, both for the May 21, 1999 film, were positive for pneumoconiosis. However, the majority of physicians interpreting that x-ray read it as negative. Moreover, the physicians who interpreted the film as positive were both B-readers, while five out of the six other interpreting physicians who read the film as negative were dually qualified board-certified radiologists and B-readers. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (*en banc on recon.*); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). Accordingly, because the overwhelming majority of x-ray readings of record are negative, this tribunal finds that Claimant has not established the existence of pneumoconiosis by a preponderance of the evidence under §718.202(a)(1).

Nor do the reasoned opinions of the physicians of record establish the existence of pneumoconiosis under §718.202(a)(4). Of the six physicians of record opining whether Claimant had pneumoconiosis, only Dr. Forehand concluded that Claimant had pneumoconiosis. His opinion is not persuasive because it is inconsistent with the objective evidence of the case and its probative value is outweighed by the contrary opinions of the other five physicians of record, who are at least as well qualified professionally.

Dr. Forehand diagnosed Claimant with coal workers' pneumoconiosis and listed Claimant's employment history, arterial blood gas study results, and chest x-ray as the basis for such diagnosis (D-11). However, all the physicians who had the opportunity to review the record agreed that the qualifying arterial blood gas study relied upon by Dr. Forehand did not indicate an actual respiratory

impairment. Instead, they found that the test was invalid because exercise was not sustained and the Claimant's heart rate only increased from eighty-six to ninety-six after walking eighty-eight steps in two minutes, indicating a less than maximum exercise study (E-5, 7, 10). Dr. Zaldivar noted that this sub-maximal duration of exercise resulted in a drop in pO_2, but no change in pH or $_pCO_2$, which meant that the ventilation could not have changed very much at all (E-5). Dr. Zaldivar found it inconceivable that the pO_2 would have dropped as much as was reported with such little exercise without any change in ventilation. *Id.* Dr. Castle opined that the drop in pO_2 was related to Claimant's confirmed cardiac condition. Dr. Castle corroborated his opinion with evidence of Claimant's normal diffusing capacity, which indicated the absence of abnormality in blood gas transfer mechanisms, and, therefore, the absence of a disease process such as an interstitial process that would inhibit oxygen transfer (E-10). Additionally, Dr. Forehand's reliance on the chest x-ray that he interpreted as positive for pneumoconiosis is insufficient in and of itself to support a finding of pneumoconiosis in light of the contrary interpretations of that same film by dually qualified board-certified radiologists and B-readers, and in addition to the numerous other negative x-ray readings of record. Finally, Dr. Forehand's diagnosis cannot sustain a finding of pneumoconiosis based solely on the Claimant's coal mine employment history, despite its impressive length. *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984).

Drs. McSharry, Zaldivar, Fino, Morgan, and Castle have all concluded that the Claimant does not have either clinical pneumoconiosis or any other dust disease of the lungs related to Claimant's coal mine employment classifiable as legal pneumoconiosis, and this tribunal finds their opinions most persuasive. There opinions are all well-reasoned and based on extensive medical data, some of which dated back to 1966. These physicians all explained their findings with clarity and were careful to rule out both clinical and legal pneumoconiosis via discussion and analysis of the x-ray evidence, evidence indicating the absence of any form of pulmonary or respiratory impairment, Claimant's physiology and symptoms, and alternative diagnoses that account for Claimant's overall condition. Accordingly, this tribunal accords the opinions of Drs. McSharry, Zaldivar, Fino, Morgan and Castle determinative weight, and finds that the Claimant has failed to establish the existence of pneumoconiosis under §718.202(a)(4). *Church v. Eastern Assoc. Coal Corp*., 20 B.L.R. 1-8 (1996); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); *Philips v. Director, OWCP*, 768 F.2d 892 (8th Cir. 1985).

This tribunal accords little weight to the diagnoses found in the medical records from Clinch Valley Medical Center of chronic obstructive pulmonary disease, a form of pneumoconiosis if related to a miner's coal mine employment, because the diagnoses are not accompanied by reasoned opinions or supportive objective data, and the diagnoses are not positively linked to Claimant's coal mine employment.

Based on consideration of the x-ray and medical opinion evidence, this tribunal finds that Claimant has failed to establish the existence of pneumoconiosis under §718.202(a), and, therefore, has failed to establish a material change of conditions in regard to this element of entitlement.

Causation

In addition to establishing the existence of pneumoconiosis, a claimant must also establish that his pneumoconiosis arose, at least in part, out of his coal mine employment. Pursuant to §718.203(b), a claimant is entitled to a rebuttable presumption of a causal relationship between his pneumoconiosis and his coal mine employment if he worked for at least ten years as a coal miner. In the instant case, Claimant established at least thirty-six years of coal mine employment. Thus, had he established the existence of pneumoconiosis, he would have also been entitled to the rebuttable presumption that his pneumoconiosis arose from his coal mine employment under the provisions of §718.203. Because Claimant did not establish the existence of pneumoconiosis, this issue is moot.

Total Disability

To establish total disability, Claimant must prove that he is unable to engage in either his usual coal mine work or comparable and gainful work as defined in §718.204. Section 718.204(b)(2) provides the criteria for determining whether a miner is totally disabled. These criteria are: (1) pulmonary function tests qualifying under applicable regulatory standards; (2) arterial blood gas studies qualifying under applicable regulatory standards; (3) proof of pneumoconiosis and cor pulmonale with right sided congestive heart failure; or (4) proof of a disabling respiratory or pulmonary condition on the basis of the reasoned medical opinions of a physician relying upon medically acceptable clinical and laboratory diagnostic techniques. If there is contrary evidence in the record, all the evidence must be weighed in determining whether there is proof by a preponderance of the evidence that the miner is totally disabled by pneumoconiosis. *Shedlock v. Bethlahem Mines. Corp.*, 9 B.L.R. 1-95 (1986).

Three pulmonary function studies have been conducted since the previous denial of this claim (D-9, E-2, 12). None of those studies yielded qualifying results, and, accordingly, disability is not established under §718.204(b)(2)(i). None of the six resting arterial blood gas studies submitted in this claim and conducted between 1985 and 1999 yielded qualifying values (D-11, E-2, 12). Dr. Forehand's exercise study, which is also the only exercise study of record, was qualifying under the regulations, but Drs. McSharry, Zaldivar, and Castle, who reviewed the study along with a significant portion of the evidence of record, agreed that the study did not indicate a respiratory impairment, and, instead, opined persuasively that it was the result of either an invalid test or a cardiac condition (E-5, 7, 10). Their opinions are well-reasoned and based on review of the testing, and, therefore, this tribunal finds that the test is not indicative of a respiratory impairment despite validation by Dr. Ranavaya. *Milburn Colliery Co. v. Director, OWCP [Hicks*], 138 F.3d 524 (4th Cir. 1998). Therefore, Claimant has not established total disability under §718.204(b)(2)(ii). Since the medical evidence does not indicate that Claimant suffered from cor pulmonale with right-sided congestive heart failure, Claimant has failed to establish total disability under §718.204(b)(2)(iii).

Only one physician concluded that Claimant is totally and permanently disabled by a respiratory or pulmonary condition. Dr. Forehand determined that Claimant would be unable to return to work because he is totally and permanently disabled by a significant respiratory impairment of a gas-exchange nature (D-10). Dr. Forehand did not provide an explanation for this

determination. While Dr. Forehand's exercise arterial blood gas study was qualifying under the regulations, as previously stated, that study is not indicative of Claimant's respiratory condition. Therefore, in consideration of Dr. Forehand's failure to support his diagnosis of total disability with a reasoned analysis, and in light of the other physicians' opinions to the contrary, this tribunal finds that the preponderance of the evidence does not establish that Claimant is disabled pursuant to §718.204(b)(2)(iv). Accordingly, based on review of the evidence under §718.204(b)(2) this tribunal finds that Claimant has failed to establish that he is totally disabled by a respiratory or pulmonary impairment, and, therefore, has failed to establish a material change of conditions in regard to this element of entitlement.

Total Disability Due to Pneumoconiosis

To establish entitlement, a claimant must prove by a preponderance of the evidence that he is totally disabled due to pneumoconiosis. A miner is considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. §718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition, or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. *Id.*

In this case, the preponderance of the evidence did not establish that Claimant has pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, or that he is totally disabled. Therefore, the issue of whether the Claimant is totally disabled due to pneumoconiosis is moot.

Attorney's Fee

The award of an attorney's fee under the Act will be approved only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services of an attorney rendered to the Claimant in pursuit of this claim.

ORDER

The claim of Garland Stiltner for benefits under the Act is hereby denied.

A

EDWARD TERHUNE MILLER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any interested party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a notice of appeal with the **Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601.** A copy of the notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.